INDEX.

PAGE

Introduction 1

Outline of Facts Case 5620, being the large annuity case 5

Propositions II and III of Petitioner 57-58

Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U. S. C. A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract 57

In an action instituted in the federal court under 28 U. S. C. A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested, as devisee under a will? 58

Proposition IV of Petitioner 65

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335 where the record affirmatively discloses that by their terms the insurance contracts in question are incontest-

PAGE

able, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them concerning any of the terms or conditions of the policies or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res adjudicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto? 65

The Present Case Is Not Such a Case as Under the Rules in Its Present Status Justifies certiorari . . 66

Conclusion 68

TABLE OF CASES

Appleman v. Pepis, 246 Pac. 225; 117 Okl. 199 47

Austin v. Texas-Ohio Gas Co. (C. A. Tex. 1955) 210 F. 2d 739 51

Aylesbury Mercantile Co. v. Fitch, 99 Pac. 1089, 22 Okl. 475 49

Canning, et al., v. Bennett, et al., (1952) 206 Okl. 675; 245 P. 2d 1149, Syl. 8 47

Commercial Standard Ins. Co. v. Readnour, et al., (1956) 241 F. 2d 14 64

PAGE

Connecticut Indemnity Co. v. Lee, 168 F. 2d 420..... 64

Dodd-Leer Lbr. Co. v. Gur, (1915) 44 Okl. 630; 146 Pac. 16, Syl. 3 48-49

Dugas v. American Surety Co. of N. Y., 300 U. S. 414, 57 S. Ct. 515, 81 L. ed. 720 51

Farm Mortgage Inv. Co. v. Cassell, 168 Okl. 312, 32 P. 2d 736 47

Farmers Nat'l Grain Corp. v. Kurkendall, (1938); 83 Okl. 17; 79 P. 2d 570 48

Ft. Deerborn Trust & Savings Bank v. Skelly Oil Co., 146 Okl. 179; 293 Pac. 557 47

Haynes v. Felder, (5 Cir.) 1957 U. S. C. A., 239 F. 2d 868 67

Holcomb and Hope Mfg. Co. of Indianapolis, Inc. v. Jones, 102 Okl. 175; 228 Pac. 968 47

Holcomb, et al., v. Aetna Life Ins. Co., 228 F 2d 75, certiorari denied 15

Holcomb, et al., v. Aetna Life Ins Co., (C. A. 10) 228 F. 2d 75, cert. den., 76 S. Ct. 473, 350 U. S. 986, 100 L. ed. 853; reh. den. 350 U. S. 1016, 100 L. ed. 875, 76 S. Ct. 660 .....2, 58

John Hancock Mutual Life Ins. Co. v. Kraft (U. S. Ct. of Appeals, 2nd Cir. 1953), 200 F. 2d 952 60

Kerrigan's Estate v. Joseph E. Seagram & Sons, 199 F. 2d 694 61

Lowther v. New York Life Ins. Co., (3 Cir.), 278 Fed. 405 67

Mary Jane Hopkins, et al., v. Aetna Life Ins Co..... 16

Mason, et al., v. Nibel, (1938) 120 Okl. 7; 263 Pac. 121 48

McDonald v. Bowles, (9th Cir.), 152 F. 2d 741..... 41

O'Daniel v. Porter, C. A. P. C. (1957) 218 F. 2d 636. 51

Oklahoma Title Co. v. Burroughs, 172 Okl. 94; 44 P. 2d 852 47

PAGE

Scherbondy v. Tulsa Boiler & Machinery Co., 226 Pac. 564, 99 Okl. 214 47
Skinner v. S[illegible]t, 29 Okl. 364; 118 Pac. 394 48
Wright v. School Dist. No. 97, Canadian County, 128 Pac. 241; 36 Okl. 294 49

BOOKS AND STATUTES

Article 3, Sec. 2, Cl. 1, U. S. Constitution 40
Barron & Holtzoff, Fed. Practice and Procedure, Sec. 552 60
Barron & Holtzoff, Fed. Practice and Procedure, Sec. 1262, 1263, 1264 62
Cyclopedia of Fed. Procedure, Sec. 19.15 on Pre-trial Proceedings 41
Fed. Declaratory Judgment Act, Title 28, U. S. C. A., Sec. 2201 21
Federal Rules of Procedure, Rule 8 52
Rule 16, Federal Rules 40
Federal Rules of Procedure, Rule 19 66
Federal Rules of Procedure, Rule 22 ..... 2, 49, 64
Rule 22, Moore's Fed. Practice 59
West's Federal Forms, Sec. 4786 63
Okla. Stat. Ann., 1951, Title 15, Sec. 75 46
Title 15, Okla. Stat. 1951, Sec. 74 47
Title 28, U.S. Code Ann. Sec. 1335 Interpleader 50, 57, 58
Title 28, U. S. C. A., Sec. 2201 61
Title 28, U. S. C. A. Sec. 2361 50
22 A. L. R. 2d 609 41
28 U. S. C. A. 2238 57
89 C. J. S., p. 535, Sec. 5 49

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1958

No. 365

DONALD GEORGE FLEMING, a minor, individually, and by LEONA HOLCOMB, as guardian, *Petitioner,*

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, Francis X. Rettenmeyer, Executor of the Estate of Joseph A. Rettenmeyer, deceased, F. E. Pence, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy, Justin W. Faharty, First National Bank and Trust Company of Oklahoma City, Oklahoma, Leona Holcomb, individually, Frank T. Denham, May Cecilia Denham, Dorothy Lee Denham, a minor, Carolyn Denham Lumley, May Cecelia Denham as guardian of Dorothy Lee Denham, a minor, George Denham, Clarence Denham, Mary Jane Hopkins, *nee* Wright, and Mary Ellen Cash, *Respondents.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI.*

Introduction.

There are two cases involved, the first, No. 5620 in the court below is one in the nature of interpleader, brought by Aetna Life Insurance Company. Aetna had issued a large annuity contract to Rosa B. Wright-Rettenmeyer. At her death certain of her heirs some of whom were contingent beneficiaries under the annuity instituted conversion actions in the state courts claiming the funds that went to pay the premium of the annuity one of the plaintiffs, not a beneficiary was Donald George Fleming,

a minor. Certain other heirs, who were beneficiaries under the annuities asserted claims to benefits under the annuities as contingent beneficiaries. Faced with claims for a refund of the premiums allegedly converted by the insurance company, and with claims asserting the validity of the annuity by two sets of conflicting heirs and beneficiaries plaintiff instituted the present action. The trial court issued a temporary restraining order enjoining the prosecution of actions against Aetna pending determination of the interpleader action and until the further order of the court. After motion to dismiss was overruled and appeal time elapsed the court entered an order construing the order heretofore made specifically naming certain causes of action pending in the state court against the Aetna. From this order construing the order heretofore made appeal was lodged in the Court of Appeals of the Tenth Circuit, and this court affirmed the trial court. *Holcomb, et al.*, v. *Aetna Life Insurance Co.*, (Ct. of Appeals, 10th Cir., 1955) 228 F. 2d 75, certiorari was denied by the Supreme Court of the United States, 76 S. Ct. 473, 350 U. S. 986, 100 L. ed. 853; rehearing denied 350 U. S. 1016, 100 L. ed. 875, 76 S. Ct. 660.

At the same time the first case was filed on the large Rettenmeyer annuity contract there was filed the second action in the nature of interpleader, No. 5621 in the court below, under Rule 22, and for Declaratory judgment to determine the validity of a smaller annuity insurance policy upon the life of Donald George Fleming, a minor, procured by funds of Rosa B. Wright Rettenmeyer, annuitant of the large annuity.

After the appeal was remanded to the District Court the cases were consolidated for purposes of trial, and there was a pre-trial hearing.

The large annuity case No. 5620 culminated in an entry of a judgment at the pre-trial hearing following a statement of counsel for the Denham heirs, including Donald George Fleming, that the beneficiaries under the annuity and insurance contracts made no contention that the policies were invalid and that they were entitled to the moneys due under the policies. The court considered this as a ratification of both the large annuity and the Donald George Fleming insurance contract and on refusal of the Denham heirs to tender any issue or claim for conversion of the bonds in the interpleader actions in the United States District Court, entered a judgment for the plaintiff and perpetually enjoining defendants from proceeding further with their claims against the insurance company and other defendants in Case No. 87402, which was the State Court action in the District Court of Tulsa County, Oklahoma. In the smaller insurance contract Case No. 5621, petitioner, Donald George Fleming, a minor, was given a judgment upholding the insurance policy in his name by which he will receive $33,000.00 and upwards, and he appealed from the judgment.

The facts as disclosed by the pleadings and the pre-trial conference and the admissions will show that Donald George Fleming is a beneficiary under a single premium life insurance contract procured by his aunt, Rosa B. Wright Rettenmeyer, and paid for by her funds. Donald George Fleming in two separate lawsuits was a party to

actions to procure a return of funds that went to pay the premiums paid from the funds of Rosa B. Wright Rettenmeyer. In the U. S. District Court below and in the Court of Appeals he asserts that the contract of insurance is perfectly valid and, in view of the statements of counsel, at the pre-trial, that no one questioned the validity of the contract or the payment of the premiums paid before the death of Rosa B. Wright Rettenmeyer, the trial court had no alternative on the pre-trial, but to render a judgment in the nature of a declaratory judgment declaring the insurance contract in favor of Donald George Fleming, the petitioner, valid and restraining him and the remaining Denham heirs from proceeding in a suit to obtain a return of the premiums.

On appeal to the Court of Appeals for the 10th Circuit, the Court of Appeals affirmed the judgment of the trial court (see opinion, transcript in this Court and copied in petitioner's petition for certiorari, p. 19) *et seq.* and also reported in 255 F. 2d, 577.

Inasmuch as the facts are not sufficiently related in petitioner's petition we deem it necessary to set forth a chronological outline of the facts in both cases for a better understanding of the case.

Case Number 3502 is the U. S. District Court Interpleader Action on the large annuity;

Case Number 3503 is the U. S. District Court Interpleader and Declaratory Judgment action;

Case Number 5056 is in the U. S. Court of Appeals, being the appeal of the Denham heirs from the temporary restraining order;

Case Number 5620 is the appeal of the Denham heirs to the Court of Appeals from the pre-trial judgment on the large annuity;

Case Number 5621 is the appeal of the Denham heirs from the pre-trial judgment construing the small Donald George Fleming insurance annuity contract;

Case Number 87402 is the Tulsa County District Court case where the Denham heirs sued Aetna for conversion in the State Court;

Case Number 29092 is a case first filed in Creek County District Court of Oklahoma for conversion of a portion of the bonds that purchased the large annuity;

Case Number 29114 is a case filed in Creek County District Court for conversion of a portion of the bonds that purchased the smaller Donald George Fleming contract.

Outline of Facts Case 5620, being the large annuity case.

The record discloses:

Rosa B. Wright was the widow of a wealthy Oklahoman named Cal Wright and inherited a considerable estate from him. He died in March of 1928.

Rosa B. Wright married Joseph A. Rettenmeyer in 1937 (R. 5056, p. 13). Prior to her marriage an antenuptial contract was entered into in March of 1937 (R. 5056, p. 18). The gist of this agreement was to the effect that neither should have any claim on the property of the other.

In July of 1946, Rosa B. Wright Rettenmeyer executed a will (R. 556, p. 39). It provided the remainder and residue of the testatrix's property, went share and share alike to the following: Leona Denham Holcomb, a niece; Mary Jane Wright Hopkins, niece and adopted daughter; Frank T. Denham, a nephew; Edward Denham, a nephew; Clarence Denham, a nephew; George N. Denham, a nephew; Raymond Rettenmeyer, Forrest Rettenmeyer and F. X. Rettenmeyer, sons of Joseph A. Rettenmeyer and nephews of Rosa by her previous marriage, and Joseph A. Rettenmeyer, her husband, and Donald George Fleming, son of Leona Denham Holcomb. She nominated the First National Bank & Trust Company of Oklahoma City to be executor of the will.

In February of 1949 she suffered a stroke (R. 5056, p. 16).

On March 30, 1949, she executed a Power of Attorney to her husband, Joseph A. Rettenmeyer (R. 5056, p. 40).

The Second Power of Attorney was executed April 18, 1949 (R. 5056, p. 42).

On November 17, 1950, Rosa B. Wright Rettenmeyer signed an application for the puchase of an annuity contract No. AN33409 from Aetna Life Insurance Company, which is the subject of the interpleader action. It was issued on the 9th day of December, 1950 (R. 5056, p. 5, *et seq.*). It was a single premium contract and in consideraton of payment of the premium of $162,606.00, the Aetna agreed to pay $1,000.00 a month to Rosa B. Wright Rettenmeyer during her lifetime. After the death of Rosa B.

Wright Rettenmeyer each annuity payment of $1,000.00 a month should become payable to Joseph A. Rettenmeyer, husband of the annuitant if then living. After the death of the survivor, Joseph A. Rettenmeyer, the $1,000.00 a month should be apportioned when due as follows:

$123.07	Ellen Cash, niece of the annuitant
$123.07	Rufus Denham, nephew
$123.07	Marion Denham, nephew
$123.08	Lewis Denham
$123.07	Marion Rettenmeyer (widow of Forest Rettenmeyer)
$123.08	Frank X. Rettenmeyer, nephew of the annuitant
$123.08	Raymond D. Rettenmeyer, nephew of the annuitant
$ 23.08	Frank T. Denham
$ 23.08	Edward Denham
$ 23.08	Clarence M. Denham
$ 23.08	George N. Denham
$ 23.08	Leona Denham Holcomb
$ 23.08	Mary Jane Hopkins

On November 22, 1950, she executed the first codicil to her will (R. 5056, p. 43). In this codicil she referred to the gifts to the heirs mentioned in her will, and mentioned that Forest Rettenmeyer had died, leaving Marion Rettenmeyer, his widow, and she wrote that she desired that Marion Rettenmeyer take the part of her estate which would have been taken by the nephew. A certain note of Harve Bateman and Rosa B. Bateman for $10,000.00 was cancelled and the rest of the will was confirmed.

On January 30, 1951, she executed a second codicil (R. 5056, p. 45), which confirmed the will as modified by the first codicil and added a remark that if anyone contested the will his or her share becomes a part of the residuary estate and goes to the other heirs.

Rosa received $1,000.00 a month beginning in January, 1951, which payments continued on down to her death and then they were paid to Joseph A. Rettenmeyer, which payments continued on down to the date of his death. She died December 13, 1952, he died March 22, 1954 (R. 5056, p. 45).

Rosa B. Wright Rettenmeyer was adjudged incompetent by the County Court of Creek County on August 26, 1952, in Cause No. 6366 (R. 5056, p. 48). The Petition for Appointment of a Guardian was filed by Joseph A. Rettenmeyer through Embry, Johnson, Crowe, Tolbert & Boxley, his attorneys (R. 5056, p. 47). The County Court appointed her husband, Joseph A. Rettenmeyer, guardian of her person and appointed Guy L. Berry, a Sapulpa banker, guardian of her estate. At the time of the death of Joseph A. Rettenmeyer $39,000.00 had been returned under the annuity contract, either to Rosa or to Joseph under her power of attorney or to the guardian of Rosa or to Joseph after her death.

Letters testamentary were issued in the County Court of Creek County in Case No. 6442 after her will and both of the foregoing codicils had been admitted to probate on January 12, 1953 (R. 5056, p. 39).

The First National Bank and Trust Company of Oklahoma City was appointed executor of her estate. The claims and attacks on the annuity contract and the smaller annuity policy issued on the life of Donald George Fleming appear first to have been brought out in Case No. 6442, her will probate case. These attacks appear in the amendments to the Complaint in Intervention (R. 5056, p. 69) and were asserted in a Complaint in Intervention filed by Leona Holcomb and the other above named defendants, Hopkins and Denhams. It was alleged that while Rosa was incompetent and mentally incapacitated, that Joseph A. Rettenmeyer procured from her funds an annuity contract from Aetna Life Insurance Company ostensibly to Donald George Fleming in the face amount of $33,000.00. It was further alleged that within a month after procuring this first annuity contract with her funds; Joseph A. Rettenmeyer secured another annuity contract from Aetna Life Insurance Co. in the face amount of $162,000.00.

In the Complaint in Intervention in the County Court case in the prayer for relief it was sought by the Denham heirs to have the executor, First National Bank and Trust Company ordered to institute a suit to recover all omitted property belonging to the estate, including monies expended for annuity contracts.

Thereafter in the same probate case, Leona Holcomb and certain of the other defendants again attacked the validity of the annuity contract and the Donald George Fleming policy in an Amended Complaint in Intervention (R. 5056, p. 71).

This proceeding was heard by the County Court of Creek County on October 22, 1953. Judgment was rendered in that court as appears from the Journal Entry of the Judgment of the County Court (R. 5056, p. 22).

The present status of the appeal from the County Court is immaterial to this appeal and need not be discussed.

While the appeal was pending in the County Court case there was filed in the District Court of Creek County Case No. 29092 (R. 5056, p. 13). This was filed September 30, 1953. The plaintiffs were Leona Holcomb, Leona Holcomb, as guardian of Donald George Fleming, a minor, Ed Denham, Frank Denham, Clarence Denham, George Denham and Mary Jane Wright Hopkins. The suit was brought against Aetna Life Insurance Company, F. E. Pence (Aetna's agent), Joseph A. Rettenmeyer and the First National Bank and Trust Company, executor of the estate of Rosa B. Wright Rettenmeyer. An analysis of this suit shows that it is a damage suit against Aetna, Pence, and Joe Rettenmeyer for wrongfully taking $162,606.00 from Rosa B. Wright Rettenmeyer when she was 80 years old and incompetent. It was a companion suit to a suit filed at the same time, No. 29114 in the District Court of Creek County on the Donald George Fleming contract.

Continuing with 29092, an analysis of the petition sets forth the family relationship, the fact that Joe married the wealthy widow, it set out the ante-nuptial contract and then said that Joe set out to circumvent the will and ante-nuptial contract and take for himself and his kin the lion's share of the estate to the exclusion of the plaintiffs. It

pleaded the execution of the will and then pleaded that the consent of the First National Bank and Trust Company as executor to recover the bonds and money wrongfully taken could not be obtained, so the bank as executor is joined as defendant. It was alleged that Joseph A. Rettenmeyer got Rosa to execute a power of attorney, and then she had a stroke, that she was totally incompetent, and then sets out that the defendants entered into a scheme to take the $162,606.00 and to accomplish this that Aetna, Pence, and Joseph A. Rettenmeyer persuaded her to liquidate U. S. Government bonds and place the proceeds in her bank account at Oklahoma City and thereafter they took and carried away the money, and as a cloak to legalize the plan and conceal it they placed the Annuity Contract No. AN33409 in and among her effects. The petition alleges that Joseph started getting the $1,000.00 a month, deposited it to Rosa's account and that he himself lived on it until her death in 1952, and that such part as was used for the benefit of Rosa was used without her knowedge or consent and for the purpose of concealing the plan and device from which her estate was taken from her. It prayed judgment for the $162,606.00 with interest against Aetna, Pence and Joseph A. Rettenmeyer.

In the Case No. 29114 it was sought by plaintiffs to recover the monies that went to purchase the $33,000 Donald George Fleming policy, $25,143.03, and allegations are similar to those in Case No. 29092.

An amended petition was filed in Case No. 29092 on April 7, 1954, and refiled April 15, 1954 (R. 5056, p. 31). Certain parties were added to this case. The plaintiffs were

the same and the suit was against Aetna Life Insurance Company, F. E. Pence and Joseph A. Rettenmeyer, Francis X. Rettenmeyer, Raymond D. Rettenmeyer, Marion Rettenmeyer, The First National Bank and Trust Company of Oklahoma City, Oklahoma. Then there were certain bankers in Oklahoma City, employees of the First National Bank, namely Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin W. Faherty, added as defendants.

The Amended Petition differs from the former Petition in that it sets forth that Rosa owned certain United States Government bonds with a market value of $191,-864.64. The petition then alleges that the bonds would have been divided according to her will, that is, 1/11th to Joseph A. Rettenmeyer and 7/11ths to the plaintiffs. 3/11ths to the children of Joseph A. Rettenmeyer, and that it was the duty of the defendants to preserve her property for disposition conformable to the terms of her ante-nuptial contract, will and codicils, but then alleges that there was a breach of trust in that the defendants on October 31, 1950, secretly entered her lockbox in the First National Bank & Trust Company and without authority of law, took, stole, and carried away the bonds and endorsed an "X" or caused an "X" to be endorsed, purporting to be the act of Rosa B. Wright Rettenmeyer and procured the cash value of $191,864.64 and converted it to their own use. It will be observed that at this time the plaintiffs have added 29114, being the suit on the Donald George Fleming policy, to Case No. 29092, and have now made Case No. 29092 a suit for conversion for the full amount of the bonds that went to purchase the two insurance contracts, and omitted any reference to annuities.

The petition then alleges that she died December 13, 1952, that the bank was appointed executor, and that it refused to sue for the recovery of the assets of the estate and increment or profit or any part thereof. And further that the plaintiffs were unable to discover the facts until less than one year prior to the date of filing the action. That the plaintiffs (although they had no present property right in the bonds) suffered damage in the sum of $191,864.64 with interest at $39,487.00, or a total of $231,351.94 plus punitive damages in the sum of $231,351.94.

Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same lawsuit was filed (R. 5056 p. 72) as the Amended Petition in No. 29092, in the District Court of Creek County.

On April 16, 1954, the present actions resulting in this appeal were filed in the United States District Court for the Northern District of Oklahoma. The first was Case No. 3502 (R. 5056 p. 3) and was a Complaint for Interpleader and was brought by Aetna Life Insurance Company against all the beneficiaries in the Policy No. AN-33409, the large annuity and also against all adverse claimants.

The complaint alleges diversity of citizenship, and that the amount in controversy exceeds the sum of $3,000.00.

The complaint alleges, after setting forth the admission of the will to probate with the codicils, that the Oklahoma Denhams, Mrs. Hopkins, Donald George Fleming and Leona Holcomb, filed Case No. 29092 against Aetna

attacking the validity of the annuity contract and seeking to recover the premium paid of $162,606.00 for the estate of Rosa B. Wright Rettenmeyer. The complaint then sets out the order of the County Court of October 22, 1953, holding that Rosa was competent and instructing that no suit against Aetna be filed. It alleges then that Joseph A. Rettenmeyer died on the 22nd of March, 1954. It alleges that the beneficiaries named in the annuity contract who were not parties to Case No. 29092, namely the Rettenmeyers, Lewis Denham, Marion Denham, Rufus Denham and Ellen Cash are claiming to be entitled to monthly payments provided in the annuity contract.

Thereafter the amended petition filed in Case No. 29092 is referred to. It is then alleged that the Denhams, Leona Holcomb and Mary Jane Hopkins by reason of their petition are seeking to have the single premium payment of $162,606.00 paid back by Aetna to the estate of Rosa B. Wright Rettenmeyer and that by reason of these conflicting claims the plaintiff alleges that a conflict has arisen as to which of the defendants are entitled to payments of their respective claims and the plaintiff has been subject and may be subjected to vexations and multitudinous lawsuits and further subjected to multiple payments in the event all of the defendants should prevail.

Then plaintiff sets forth that it has filed a bond with good and sufficient surety, the record shows the bond was approved by the court; then it prays that each defendant be restrained from instituting any action against the plaintiff or from prosecuting any pending action or actions against the plaintiff for recovery of the policy's proceeds.

or any part thereof, until the further order of the court and that the defendants be required to interplead and settle between themselves their rights.

Order for issuance of process and an injunction against interpleader claimants was issued and subsequently modified in part from which appeal was taken resulting in the decision of this Court affirming the trial court and reported in *Holcomb, et al.*, v. *Aetna Life Insurance Company* 228 F. 2d 75, certiorari denied.

On June 23rd prior to the final order appealed from, the plaintiff filed an amendment to its Complaint for Interpleader (R. 5056 p. 69) in which the plaintiff alleged that the Annuity Contract was purchased by Rosa B. Wright Rettenmeyer with the proceeds of the U. S. Government Bonds mentioned in the Amended Petition filed by Leona Holcomb in Case No. 29092 and that Rosa B. Wright Rettenmeyer signed the application for insurance and was competent when she signed the application and that she specified the terms and provisions of the annuity contract and thereafter ratified the contract by accepting the annuity payments during her lifetime and prior to the date that she was adjudged incompetent. Thereafter payments were made to the guardian of her estate, and on her death payments were made to Joseph A. Rettenmeyer, the sum total of all payments to $39,000.00.

Then the complaint further alleged that the Denhams, Holcomb, Hopkins and Fleming parties have attacked the validity of the annuity contract, not only in the maner alleged in the Complaint in Interpleader, but also in Case No. 6442 in the County Court of Creek County in which is

pleaded the contention that the purchase of the Donald George Fleming Annuity and the purchase of the large annuity were procured while she was incapacitated and that it was sought in the County Court proceedings to require the executor to institute suits to recover the money that went to purchase the two annuity contracts.

It is then shown in the amendment to the complaint (R. 5056 p. 71) that an amended complaint in the County Court was filed wherein the same attack was made on the validity of the annuity contract and the validity of the Donald George Fleming annuity. It was then alleged that Leona Holcomb and the Denhams and others in the same situation again attacked the validity of the annuity contract in Case No. 87402 in the District Court of Tulsa County, styled *Mary Jane Hopkins, et al* v. *Aetna Life Insurance Co.* To this amended complaint the Holcomb, Denham, Hopkins and Fleming interests filed amendments to their various motions and a supplemental motion to dismiss (R. 5056 p. 72).

Prior to that appeal motions were filed by the First National Bank & Trust Company for leave to intervene as well as motions to the same effect by Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty and F. E. Pence (Supp. Tr. 5056 pp. 1 to 5).

Prior to the appeal Francis X. Rettenmeyer was given permission to intervene as executor of the Estate of Joseph A. Rettenmeyer, deceased, on the 19th of November, 1954. The remaining motions were taken under advisement, briefs submitted and after argument the court

permitted the First National Bank & Trust Company, Virgil F. Sprankle, Grover D. Strother, A. N. Murphy and Justin Faherty and F. E. Pence to intervene. Amended complaints by these Intervenors were filed (R. 5620 pp. 11, 17, 18, 23 & 29). And on application of the parties duly filed for injunction by these intervenors (R. 5620 pp. 28 and 29) the court entered its decree of preliminary injunction (R. 5620 p. 30) in which the court enjoined Leona Holcomb and others similarly situated from proceeding further against Pence, the bank and the bankers in Cause No. 29092 in Creek County Court, and 87402 in the District Court of Tulsa County conditioned upon a bond being filed. The bond was duly filed and the temporary injunction and restraining order issued.

No appeal was taken from this order. Thereafter, answer was filed by defendants, Leona Holcomb, individually and as guardian of the person and estate of Donald George Fleming, a minor, Frank T. Denham, George H. Denham, Clarence Denham and Mary Jane Hopkins, to the amended Complaints of the intervenors. (R. 5620 p. 37). This answer contains no specific denial of the allegations in the amended complaints in intervention. The complaints in intervention (R. 5620 p. 10) alleged diversity of citizenship between the intervenors and Aetna and diversity of citizenship between the intervenors and all other non-residents of the State of Oklahoma. Complaints recited that Rosa had a large number of bonds in her lock box in the bank and prior to her death she contracted with Aetna through Pence for certain life insurance annuities, referring to the large annuity. The complaints alleged that

Rosa B. Wright Rettenmeyer gave to Joseph A. Rettenmeyer certain powers of attorney and pursuant to the powers of attorney Joseph Rettenmeyer procured certain government bonds endorsed by Rosa B. Wright Rettenmeyer and delivered them to Pence, and Pence in turn delivered the bonds to the First National Bank to be converted into cash. The bonds were converted into cash and the proceeds deposited in the First National Bank & Trust Company of Oklahoma City to the account of Rosa B. Wright Rettenmeyer. Thereafter, Joseph A. Rettenmeyer, under the power of attorney granted him by Rosa B. Wright Rettenmeyer drew a check, or checks, from the account of Rosa B. Wright Rettenmeyer in payment of the premium, or premiums on the Aetna Life Insurance Company annuity contract and insurance policy on the life of Donald George Fleming. Thereafter the two insurance contracts were issued.

These allegations are nowhere specifically denied in the Answers that are later filed by the defendants in the case. Answer of Leona Holcomb (R. 5620 p. 37) and others to amended complaints of intervenors, and separate Answer of Mary Ellen Cash to Amended Complaint of plaintiff and intervenors.

The Amended Complaints in Intervention set forth the status of the suits against the intervenors in the County Court of Creek County and the District Court of Tulsa County, No. 29092 and No. 87402, and seek, in the event the court should find the annuity contracts not valid that the intervenors have their rights adjudicated over and against the plaintiff, Aetna Life Insurance Company, as the ultimate recipient of such alleged converted funds.

The answer of Leona Hocomb and others (R. 5620 p. 38) has the following important paragraph:

"Defendants aver that plaintiff's liability under policy AN-33409, issued by Aetna Life Insurance Company of Hartford, Connecticut, under date of Dec. 9, 1950, is an incontestable obligation due and payable under the terms and conditions set forth and specified in said policy; * * *"

As will be later pointed out this amounts to a ratification of the policy and an election by the Leona Holcomb and the Denham heirs to take the benefits under the policy. The separate answer of Mary Ellen Cash (R. 5620 p. 40) contains the following paragraph:

"For further answer this defendant alleges that on or about Dec. 9, 1950, Aetna Life Insurance Company made, executed and delivered its policy AN-33409 under and whereby it became and has at all times since been obligated to make payments to this defendant as therein specified and set forth; this defendant admits that Exhibit 1 to plaintiff's Complaint is a true and correct copy of said policy and this defendant avers and states further that said policy contains the following express provisions, which are binding upon plaintiff, that is to say:

'This contract and the application herefor constitute the entire contract between the parties hereto and it shall be incontestable after it has been in force during the lifetime of the annuitant for a period of two years from its date of issue; * * *'."

This amounts to a ratification on the part of Ellen Cash and a reassertion of the claim by Ellen Cash.

Edward Denham died and an order was entered on October 25, 1956, substituting his heirs (R. 5620 p. 43). The defendant Leona Holcomb and the Denham heirs and Mary Jane Hopkins, filed an amendment to Answers (R. 5620 p. 44) in which is pleaded that the interlocutory order of the County Court was vacated in the District Court of Creek County and then contains the following, which amounts to a ratification of the policy:

> "Defendants further respectfully show that the policy annexed to and being part of plaintiff's Complaint as Exhibit 1, contains the following binding provisions which constitute a part and parcel thereof:
>
> "Under and by virtue of said provisions these defendants aver and assert that the plaintiff is barred and estopped from attempting to evade the obligations of said contract and said application upon grounds alien, aside and apart therefrom upon an assumption that the entire contract between the parties is other and different from that set forth in the 'contract and the application;' and said plaintiff is further barred and estopped from attempting to contest its liability to the annuitant designated in said contract by the express provisions thereof."

OUTLINE OF FACTS CASE NO. 5621

The second interpleader action was on the Donald George Fleming contract.

Turning to Case No. 5621 the Donald G. Fleming Contract we find that on the 16th day of April, 1954, the same time the large annuity suit was filed, the plaintiff, Aetna Life Insurance Company filed in the United States District Court for the Northern District of Oklahoma, its Complaint for Declaratory Judgment and for Interpleader under Rule 22, (R. 5621, p. 160) Aetna alleged it was a

Connecticut Corporation and the Complaint was under Federal Declaratory Judgment Act, Title 28, U.S.C.A. Sec., 2201, and for Interpleader under Rule 22. It recited identity of the parties, namely that the defendants, Leona Holcomb individually and Leona Holcomb, as Guardian of the person and estate of Donald George Fleming, a minor, and Donald George Fleming, Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, were all citizens and residents of the State of Okahoma, and diversity of citizenship existed, and the amount of the controversy exceeded $3,000.00 exclusive of interest and costs.

Paragraph III of the Complaint alleged facts which are undenied in the Answers filed in the case. Paragraph III in substance alleges that on October 27, 1950, Rosa B. Wright Rettenmeyer procured for the benefit of Donald George Fleming, a minor, a life insurance contract which contract was between Rosa B. Wright Rettenmeyer and the plaintiff, Aetna Life Insurance Company, for which she paid a single premium in the sum of $25,143.03. By the terms of this contract, Donald George Fleming was to be paid the sum of $33,000.00, if living, at the end of fifteen (15) years from the date of the contract. Otherwise, as provided in the contract. A copy of the policy was attached to the complaint which is Plaintiff's Exhibit 1. (R. 5621, p. 164 *et seq.*) The Complaint then alleged that Rosa died December 13, 1952. Her will was probated. Thereafter in Case No. 29114 Creek County, Leona Holcomb, Leona Holcomb as Guardian and the other named defendants, filed suit attacking the validity of the life insurance contract

and seeking to recover the premium paid in the sum of $25,143.03 for the Estate of Rosa B. Wright Rettenmeyer, joining as defendants the Estate of Rosa B. Wright Rettenmeyer, the First National Bank & Trust Company of Oklahoma City and F. E. Pence. The Petition in No. 29114 was similar to the Petition in No. 29092, Creek County District Court, the suit on the $162,000.00 annuity contract which is the subject of Case No. 3502 U. S. District Court No. 5620 in the Court of Appeals.

The Complaint further alleged that one Joseph A. Rettenmeyer, uncle of Donald George Fleming and husband of Rosa B. Wright Rettenmeyer, was the life owner of the policy, but that Joseph A. Rettenmeyer died the 22nd day of March, 1954. The complaint alleged that an actual controversy of a justiciable nature exists between plaintiff and defendants who are citizens of different states, involving the rights and liabilities under the contract of insurance and depending upon the construction of the insurance contract. Paragraph VIII of the complaint alleged that the liabilities under the policy or its transactions of Rosa B. Wright Rettenmeyer can be fully determined upon the issues presented by its complaint for Declaratory Judgment avoiding a multiplicity of suits for the reason that should the guardian of Donald George Fleming and the defendants other than Donald George Fleming prevail in the action and recover the moneys paid for the premium by Rosa B. Wright Rettenmeyer, the plaintiff might be faced with a suit by Donald George Fleming to enforce the contract of insurance, and that the rights of all the parties cannot be adjudicated in the pending action in the District Court of Creek County, and that

Donald George Fleming has a claim for all of the funds under the contract and that by reason of defendant's claims, doubt has risen as to who is entitled to the premium or the contract proceeds. Complaint then prayed for Declaratory Judgment construing the provisions of the policy and determining the respective rights and liabilities of the plaintiff and all of the defendants and praying that each defendant be restrained from instituting any action or proceeding in any pending action for the recovery of the amount of the contract. The complaint prayed further that the defendants be required to interplead and settle between themselves their rights, if any, to any money due because of the contract The complaint was verified.

After Motions to Make More Definite and Certain and to Strike were overruled by the Court, (R. 5621 p. 180, 181) an Amendment to the complaint for Interpleader was filed (R. 5621 p. 183). The amendment to the Complaint was filed June 23, 1954. Paragraph I alleged the policy was procured with the proceeds of the allegedly converted bonds. Paragraph III alleged that Leona Holcomb and the other named defendants attacked the validity of the insurance contract not only in Cause No. 29114, but also in certain proceedings in Case No. 6442 in the County Court of Creek County. In the County Court proceedings the validity of the insurance contract for Donald George Fleming was attacked in a complaint for Intervention as set forth. (R. 5621, p. 183) and also in an amended Complaint for intervention in the County Court. (R. 5621; p. 185). Paragraph V of the amendment to the Complaint alleged that the

contract of insurance has been similarly attacked in Case No. 87402 in the District Court of Tulsa County as well as Case No. 29092, Paragraph VII then alleged as follows (R. 5621, p. 185):

> "Plaintiff alleges that the said Rosa B. Wright Rettenmeyer used a portion of the proceeds of said bonds alleged to have been stolen and carried away and converted in paragraph 13 of the amended petition in No. 29092 and in paragraph 13 of the petition of Case No. 87402, to-wit: the sum of $25,143.03."

Defendants filed a Motion to Dismiss (R. 5621, p. 188)

This Motion was filed August 27, 1954, Rettenmeyer had died March 22, 1954.

On September 17, 1954, the Court overruled the Motion to Dismiss and entered and Order Abating the Action and Order Retaining Jurisdiction (R. 5621, p. 191). This was at the same proceeding where the Court overruled motions to dismiss the action in the Rosa B. Wright annuity suit Case 3502 or 5620 in the Court of Appeal and granted temporary restraining order. There was no appeal for this order refusing to dismiss the Complaint. Thereafter, following the decision of the Court of Appeals in Case 5056 on the large annuity case, F. E. Pence filed his Complaint in Intervention, with permission of the Court. (R. 5621, p. 108). Pence's Complaint (R. 5621, p. 192) alleges that Pence was a citizen of Oklahoma and that diversity of citizenship exists between the Intervenor and Aetna Life Insurance Company. (Actually all parties except plaintiff are Oklahomans) In Paragraph 2 Pence alleged for his claim against Aetna Life Insurance Com-

pany that Rosa B. Wright Rettenmeyer owned certain Government Bonds and prior to her death Rosa B. Wright Rettenmeyer contracted with Aetna Life Insurance Company through Pence for the purchase of the Policy of Insurance No. NI-669203, paying a single premium in the sum of $25,143.03. That the defendants filed Case No. 29114 in the District Court of Creek County and in this suit the plaintiffs therein were seeking to recover the money paid for the insurance policy and by reason of the fact it was contended that Government Bonds in the sum of $25,143.03 were converted by Pence as Agent of Aetna, reduced to cash and the proceeds used to purchase the insurance policy, but should the Court hold the policy invalid, plaintiff being the ultimate holder, the intervenor has the right to trace the funds into the hands of plaintiff, Aetna, to make the funds available to return to the plaintiffs in Cause No. 29114. Intervenor, in his prayer for relief, prayed that the insurance contract be declared valid and binding, or, in the alternative, should the Court hold the policy invalid that the intervenor have his rights adjudicated over and against the plaintiff, Aetna. On the 25th day of July, 1956, the Court entered the following order (R. 5621, p. 195):

> "Now, on this 25th day of July, 1956, the above captioned cause came on for hearing on the Court's own motion. All parties appeared by their respective counsel, and the Court having considered the status of the case, and the Court being fully advised, and on oral application in open Court if the plaintiff to vacate the Abatement Order and exercise jurisdiction, finds that the Order Abating the action heretofore made on the 17th day of September, 1954, should be vacated, set aside and held for naught."

The Court allowed the defendants 20 days to answer and granted a motion for a Preliminary Injunction (R. 5621, p. 195) restraining and enjoining the defendant Leona Holcomb, individually, and as Guardian of Donald George Fleming, and the other Denham heirs from instituting any suit in any State Court restraining them from prosecuting any suit pending in any State Court, and further enjoining and restraining them from instituting or prosecuting in any United States Court any suit or proceeding on account of or pertaining to Insurance Policy No. NI-669203, reserving unto them the right to appear in the instant suit and assert their claims which they may have.

By the 21st day of August, 1956, we find that the plaintiffs had dismissed No. 29092 and 29114 for in an argument on a Motion to Vacate the Preliminary Injunction, Mr. Young stated to the Court (R. 5621, p. 106), "We have dismissed all of these lawsuits, except 87402 pending in the District Court of Tulsa County, Oklahoma."

We now come to an important part of the case where Donald George Fleming, a minor, filed his Answer (R. 5621, p. 198). Donald George Fleming makes no general denial and denies no facts set forth in the Complaint filed except as hereinafter stated.

Paragraph 1 of the answer, Donald George pleads lack of jurisdiction. In Paragraph 2 he said that the Complaint fails to set forth any cause of action or ground for relief. Paragraph 3 alleges:

> "3. For further answer this defendant alleges that under date of Oct. 27, 1950, and when this defendant was a minor, 11 years of age, upon his application

duly made and executed, a copy of which application is appended to and made part of plaintiff's Complaint Aetna Life Insurance Company, the plaintiff, issued its policy No. N1-669203, and that Exhibit 1, appended to plaintiff's Complaint, is a true and correct copy of said policy."

Examination of this policy shows Donald George Fleming did sign the policy application, also Rosa B. Wright Rettenmeyer's name was signed by Joseph A. Rettenmeyer, attorney in fact (R. 5621, p. 177). Her name appears under the following:

"The premiums are to be paid from the funds of the undersigned."

The Answer then sets forth Paragraph 8 of the Policy which is the part saying the policy is incontestable after it has been in force for a period of two years, Then follows in the Answer an allegation which amounts to a ratification of the policy. This allegation is, as follows (R. 5621, p. 188):

"This defendant avers and alleges that under and by virtue of the foregoing express provisions of said policy, plaintiff is precluded from denying liability thereon; that said policy is now and has been at all times since the date of issuance thereof in full force and effect, incontestable by its terms, and the same constitutes a valid and binding obligation of plaintiff respecting the terms and conditions of which there neither is or has been any controversy between Aetna and this defendant of which this defendant has knowledge."

Paragraph 4 of the Answer alleges that none of the other defendants were parties to the contract and "that neither they nor any of them are entitled to benefits here-

under; nor have they, or either of them, so far as known to this defendant at any time asserted or claimed any rights or interests to any benefits under said policy, direct or indirectly."

Paragraph 7 of the Answer contained a general denial; however, the admissions in the Answer inconsistent with the general denial stand ahead of the general denial. The defendants, Leona Holcomb, individually, Frank Denham, George Denham, Clarence Denham and Mary Jane Hopkins filed separate Answers. (R. 5621, p. 197) In these Answers, each of these defendants adopt the separate answer of Donald George Fleming denying all material allegations of plaintiff's Complaint inconsistent thereto. They, therefore, adopt the admissions set forth in Donald George Fleming's Answer.

Donald George Fleming then filed a separate Answer to the Complaint of Intervener, F. E. Pence. (R. 5621, p. 202) Paragraph 1 sets forth absence of jurisdiction; Paragraph 2 sets forth that Pence and Donald George were residents of Oklahoma and there was no diversity of citizenship between Pence and this defendant. Paragraph 3 sets forth that the Complaint fails to state a claim; Paragraph 4 is, as follows:

> "4. Defendant avers that plaintiff's liability upon its policy No. N1-1669203 is an incontestable obligation, due and payable upon the face of the record under the terms and conditions of said policy to this defendant only."

The remaining defendants Leona Holcomb, as Guardian, and also the individual defendant, Leona Holcomb,

for their separate answers to Pence's Intervening Complaint, filed separate answers adopting the separate answer of Donald George Fleming to the Complaint of Intervener. (R. 5621, p. 200)

Thereafter, it developed that Edward Denham died July 31, 1956, and the action was revived pursuant to Order of Court entered October 25, 1956, as to Ed Denham. (R. 5621, p. 205) In the Order it was ordered that the action proceed on pleadings filed by Edward Denham the same as though filed for the other defendants.

The pleadings by the other defendants were adopted by the substituted defendants (R. 5621, p. 109).

We then came to the action of the court which took place at the pre-trial hearing on December 10, 1956 (R. 5620 p. 120 *et seq.*) Before that time the court vacated its order abating the interpleader and declaratory judgment action on the Donald George Fleming policy (R. 5620, p. 195), and the pre-trial took up both cases.

After counsel for Aetna made a statement regarding the proposed proof of the plaintiff and the history of the litigation which at this point will not be repeated, counsel for Donald George Fleming, the Denham heirs, Leona Holcomb, and Hopkins, made the following statements (R. 5620, p. 133):

> "Mr. Glenn O. Young: Now we think the issues here, if your Honor please, are determined very largely by the contract that Aetna issued, which we understand Aetna is here, on the theory that there are divergent and conflicting claims being made on the proceeds of the annuity issued by Aetna—rather,

two of them, the two cases are sort of companion cases and I am assuming will be more or less unavoidably interlocked, at least Mr. Woolsey has treated them so. We don't agree that they constitute a single cause of action; rather we say they are separate contracts, with different persons.

"Now our thought about the matter is this: Aetna's liability is not other or different than set forth in his contract, because the contract says expressly that the policy and the application constitute the entire contract between the parties; that is paragraph 7 of the contract before the Court, is the policy of Aetna, and appended to the policy is the application referred to in the policy. The policy contains a further proviso expressly assenting that after lapse of two years it shall be incontestable. Now we assert here that there isn't any controversy between anybody, that the issuance of the policy—we say it was issued by Aetna; we say it is uncontestable. We say there is no conflict among the parties who are designated as annuitants, as to who receives what. There is nothing under the policy that is in controversy at all. The beneficiaries under the policy the identity of them is established. None of them are contending that the policy is invalid—they are not contending that one is entitled to a little more or a little less; they are not asking for a refund of any premiums that were paid prior to the date of the death of Rosa B. Wright Bettenmeyer—no such question is involved; no question raised concerning the payments that were made under the policy to either Joe, or to the guardian, or the circumstances under which they were made for the purpose of this litigation in this Court. * * * I say there is no controversy in this Court at this time pertaining to any payments made by Aetna, but if the question was raised Your Honor would be confronted

here with the express provision of the application which says that these payments under this policy are to be made to the annuitant."

Then a colloquy took place between the court and Mr. Young in which the court reviewed the litigation and the contentions of the parties (R. 5620 p. 134):

"The Court: Well, now, let me first make quite clear my conception of what the situation is in this case at this time. * * *" And then said:

"* * * While the case involves of course some very naughty (knotty) problems, which have been rather perplexing to me, nevertheless we have now arrived at the point where I have concluded, as fa as I am concerned, that all of these matters must litigated here. And it has been my intention in enter- ig the orders that have heretofore been entered to require the parties who are defendants here, who are among the beneficiaries of the annuity contract and who are likewise plaintiffs in the suit pending in the District Court of Tulsa County, to assert here in this Court, if they choose to do so, whatever claims they may have, not only against the Aetna, but against the other parties defendant in the pending case in the District Court of Tulsa County.

"Now, of course I cannot require the parties to assert the claim here. I can only require that the claim be asserted here, or otherwise suffer a ruling to be made by the Court which would in my judgment be *res adjudicata* with respect to the issues joined now in the District Court of Tulsa County.

"Now I note from the answers filed by your clients—on behalf of your clients, Mr. Young, that there is apparently no attempt to join issue here in this case on the alleged cause of action plead and asserted in the District Court of Tulsa County. It appears to me that the answer filed on behalf of your

clients is intended to reassert, reallege, and restate the position that you have taken all along, that this Court has no jurisdiction to pass upon the issues which are joined between the parties in the District Court of Tulsa County. So, I think it quite essential here at this pre-trial hearing that we come to a definite understanding as to what issues are joined between the parties in this case which are to be tried—actually tried when the case comes on for trial.

"Mr. Glenn O. Young: May I proceed?

"The Court: I invite your further attention to those matters.

"Mr. Glenn O. Young: I would like, in answer to Your Honor's observations, to assert first this: On behalf of our clients we don't want to subject them to a situation where they can lose a lawsuit but not win it. Our objection to litigating this case over in Tulsa County, in this Court, is that all we could possibly do would be lose. This court has got no jurisdiction under either the pleadings of Aetna, or otherwise, as we understand the law, to decide a tort claim against, for instance, Joe Rettenmeyer.

"The Court: Yes, sir.

"Mr. Glenn O. Young: His successors—

"The Court: I understand. I say, that has been your position all along. We are at the point now

"Mr. Glenn O. Young: If your Honor has—

"The Court: Where the only thing we need to come to an understanding about is whether you on behalf of your clients intend to assert here in this Court the tort claim, as you refer to it, which has been pled in the District Court of Tulsa County.

"Mr. Glenn O. Young: I am attempting, if your Honor please, to show why, in properly representing our clients, we could not, if we elected to do so, —

mit the tort claim to this Court, because this Court cannot in our considered opinion lawfully render a judgment in our favor, and we are serious about the claim that I say is asserted, and it is for that reason we ourselves in, a place where—naturally Aetna would like to litigate the lawsuit where they can win and not lose, and so would these other point tort feasors; they would like to have the claim asserted and determined over here where they have got no chance to lose. As we understand the essence of justice it would be that the Court would be permitted to do full and complete justice; if our claim is correct that Aetna Life Insurance Company and its co-defendants converted unlawfully, bonds, and owes us some hundreds of thousands, worth of damages under the law, we ought not to be required to litigate that claim in a position where we can lose it but can't win it.

"The Court: Well, I understand that has been your position all along. What I am calling your attention to now is that by virtue of orders heretofore entered in this Court, one of which is affirmed by the Court of Appeals, it is presently my view that you must litigate that question here, if at all.

"Mr. Glenn O. Young: Well—

"The Court: And it is further my view that if you don't tend the issue here and litigate it here that it will be necessary for this Court to enter a judgment which will attempt to foreclose you with respect to that issue.

"Mr. Glenn O. Young: Well—

"The Court: And bar, under the principles of *res adjudicata*, any subsequent litigation on that proposition. Now.—

"Mr. Glenn O. Young: May I—

"The Court: It is perfectly all right with us. The only thing I am trying to do is to be certain that we have no misunderstanding about it.

"Mr. Glenn O. Young: I think we have none except this:

"The Court: All right.

"Mr. Glenn O. Young: We think it rather unfortunate Your Honor would adjudicate the case before you hear us.

"The Court: Before I hear you?

"Mr. Glenn O. Young: Yes.

"The Court: I am perfectly willing to hear you if you tender the issue; I can't hear you if you don't tender the issue.

"Mr. Glenn O. Young: We are, if the Court please, tendering what we think are the only issues that could arise in this case.

"The Court: I understand, but—

"Mr. Glenn O. Young: And to say that the pleadings are the measure of the issues.

* * * * * * * *

"The Court: * * * —now this is my present view about it—I will raise this question for further view about it—I won't think that the burden is on Aetna to go into the question and affirmatively establish that the bonds were legally and lawfully cashed, the proceeds of which were used to pay the single premiums on these policies, unless one or more of the defendents raise that question and offer evidence intending to establish that proposition. In other words the burden is in my judgment upon any party defendant in this case to establish either the alleged illegality of the contract—annuity contract—and as I understand it nobody contends that it is illegal—and furthermore, the burden would be upon any party defendant to allege and prove any liability arising out of the conversion of bonds, the proceeds of which were used to pay the premium on the policy. It is my view

the burden is not on Aetna to go forward with the proof, with the alleged—with respect to the alleged conversion of these bonds. We get into that question only in the event you tender the issue in my judgment.

"Mr. Glenn O. Young: Aetna has not tendered that issue; neither have we.

"The Court: Well, I am trying to find out whether you intend to, or not. I want to know what we are going to try.

"Mr. Glenn O. Young: There is nobody more interested in that than we are, of course.

"The Court: Well, I am going to tell you—I am going to tell you when you get through, if you will answer my question and tell me whether you intend to tender that issue or not.

"Mr. Glenn O. Young: We think our pleadings measure our claims in this Court accurately and carefully, and we think Aetna's pleadings measure their rights.

"The Court: I take it from your statement then—

"Mr. Glenn O. Young: Aetna here—

"The Court: Listen to me a minute. I take it from your statement, or your failure to answer my question—

"Mr. Glenn O. Young: I have stated I feel in answer to your question—I have answered it.

"The Court: That these—since these pleadings don't charge Aetna with conversion of the bonds that you do not expect to offer proof intended to establish conversion of the bonds when this case comes on for trial.

"Mr. Glenn O. Young: In regard to that I will say this: That we will contest every claim Aetna makes. Now Aetna's pleadings are here before Your

Honor, and Aetna's pleadings don't contend that these bonds were or were not converted; they don't tender that issue. And I know of no reason why we should controvert an issue that they don't tender.

"The Court: All right, in view of that statement I will say now that if any evidence should be offered by the defendants designed to establish an alleged conversion of the bonds when the case comes on for trial that it will not be heard by the Court—it won't be received because of the position taken by counsel at this hearing as indicated by the record by the court—it won't be received because of the position taken by counsel at this hearing as indicated by the record already made.

"Mr. Glenn O. Young: Is Your Honor mindful of the fact that we have generally denied all Aetna asserts?

"The Court: Yes, I think I am.

"Mr. Glenn O. Young: And specifically denied it?

"The Court: I think I am aware of that.

"Mr. Glenn O. Young: I want Your Honor to understand now, if there is any doubt about it, so the record may be clear, that we contest every statement that Mr. Aetna—Mr. Woolsey has made in his opening statement to this Court—we contest them all.

"The Court: Do you take the position that the burden is on you under the state of these pleadings to affirmatively establish the circumstances under which these bonds were cashed and the proceeds used?

"Mr. Woolsey: Not now, Your Honor, in view of the fact of what Mr. Young has stated, that none of the heirs, or none of the Denhams, or none of the beneficiaries of the policies—either policy takes the position that the contracts are invalid; in other words

my position now is simply this: You can't eat your cake and have it too. That either the contracts are valid or they are invalid. If they are valid, Aetna can retain the premiums. You have gotten now from a statement of counsel a ratification by the Denham heirs of these contracts under the same—they now assert in this Court that they stand ready, willing and able to receive their part of the money. They don't claim it, but they say that they are willing to accept it and therefore they are in no better position than Rosa B.—

"The Court: I don't believe there is anything left to try; I think this case is now ripe for entry of judgment.

"Mr. Woolsey: I am inclined to agree with Your Honor. It is a proposition that they have ratified the contract by their statement, and I tender in open court payment of both the amount due under these contracts, and annuities, to the Denham heirs, together with accrued interest—I tender it in open court.

"The Court: All right, I am going to enter judgment accordingly in both cases on both contracts, of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay to Fleming in accordance with the terms thereof, and I believe the only—Donald George Fleming is the—.

"Mr. Woolsey: He is the beneficiary.

"The Court: Beneficiary under the contract.

. . . . . .

"The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined

from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicatation*.

* * * * * * * *

"The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time."

A Decree was entered in which the court held the annuity No. AN-33409 was valid and that the proceeds be paid to the named beneficiaries, and that the defendants appellants, be perpetually enjoined and restrained from making further claims against the plaintiff, and against the intervenors on account of the alleged conversion of the bonds mentioned in their petition in cause No. 87042 (R. 5620 p. 51); and from this Decree and Order Overruling the Motion for New Trial filed by the Denham heirs, Holcomb and Hopkins appeal was lodged in the Court of Appeals.

In the Donald George Fleming case, the Court entered its Order of Declaratory Judgment, which judgment stems from pre-trial hearing in the Court's final remarks (R. 5621, p. 142):

"The Court: All right, I am going to enter judgment accordingly in both cases on both contracts of course—with respect to the contract of which Fleming is the beneficiary there will be a declaratory judgment that the contract is valid and in full force and effect, and that Aetna will be required to pay Fleming in accordance with the terms thereof, or to the beneficiaries in accordance with the terms thereof, and I believe the only—Donald George Fleming is the—

"Mr. Woolsey: He is the beneficiary.

"The Court: Beneficiary under the contract. • • •

"The Court: The Court will enter further judgment to the effect that the defendants here who are parties plaintiff in the case pending in the District Court of Tulsa County are permanently enjoined from prosecuting that suit upon the theory that the action is barred under the principles of *res adjudicata.* • • •

"The Court: Everybody takes the position here now at this hearing this morning that this is a valid contract, and the proceeds of the contract should be paid to the beneficiaries; and that is the reason I am entering the judgment that I am entering here at this time."

The Court entered its Journal Entry of Declaratory Judgment (R. 5621, p. 206). The Decree after setting forth its formal parts, and the findings as to jurisdiction and diversity of citizenship and that justiciable controversy exists between plaintiff and defendants, is as follows:

'It is therefore Ordered, Adjudged and Decreed that the contract of insurance No. NI-669203 wherein Donald George Fleming is the insured, is declared to be a valid contract and in full force and effect and the Plaintiff is ordered and directed to pay to the said Donald George Fleming the payments set forth in the policy in accordance with the terms thereof when due.

"It is further Ordered, Adjudged, and Decreed that Leona Holcomb individually and Leona Holcomb as guardian of the person and estate of Donald George Fleming, a minor, Donald George Fleming, a minor, Frank T. Denham, George N. Denham, and Mary Jane Hopkins and May Cecilia Denham individually and May Cecilia Denham as guardian of Dorothy Lee Denham, a minor, Dorothy Denham, a minor, and Carolyn Denham Lumley, heirs of Edward Denham, be and

they are hereby perpetually enjoined and restrained from making any further claim against the Plaintiff and against the intervenor F. E. Pence, on account of the alleged conversion of the bonds or conversion of the funds that went to purchase the insurance contract No. NI-669203 hereinbefore referred to, and they are perpetually enjoined and restrained from proceeding further in Cause No. 87402 in the District Court of Tulsa County."

The two cases were then appealed to the Court of Appeals for the Tenth Circuit resulting in an affirmance by the Appellate Court (See Opinion p. 19 of Petition for Certiorari.) and 255 F. (2) 577—Donald George Fleming alone petitions this court for certiorari. None of the other defendants appeal to this court.

I.

The entry of judgment decreeing a permanent injunction at the pre-trial conference did not violate Article 3, Sec. 2, Cl. 1 of the U. S. Constitution and such judgment was authorized.

The entry of a judgment on pre-trial proceeding was authorized where no issues of fact remained to be tried.

The court, on the pre-trial, rendered judgment in favor of the plaintiff in determining, after the Denham heirs including Donald George Fleming, the petitioners here, refused to tender any claim and ratified the policy, that they should be permanently enjoined from proceeding to sue in any suit, particularly No. 87402. This was a correct ruling. Pre-trial conference is had under Rule 16, Federal Rules.

"Stipulations and statements of counsel at a pre-trial conference are binding with respect to facts admitted or agreed or defenses waived."

In Cyclopedia of Federal Procedure, Sec. 19.15 on Pre-trial proceedings it is said:

> "If the admission go far enough, or if the evidence is clear enough, no trial at all may be necessary. • • •"

Section 1933 of the same text says:

> "• • • But it is entirely possible that the state of the record at the stage of pre-trial hearing may be such as to make the entry of a final judgment disposing of the case not only proper but virtually mandatory."

The purpose of pre-trial procedure is to simplify the issues and avoid unnecessary proof of facts at the trial. *McDonald* v. *Bowles*, (9th Cir.), 152 F. 2d 741. Where pre-trial admissions and pleadings show no issues of fact remain the court has power to decide questions of law and enter summary judgment. 22 A. L. R. 2d 609.

We believe, at this point, that we should point out how the appellants removed any and all issues from the case by their statements in their pleadings, and by their statements at the pre-trial hearing so that there was no issue left for the court to determine. Therefore, the court was correct in rendering judgment on the pre-trial. We will endeavor to point out in the pleadings of the parties where some statement, or admission is made by appellants wherein the contracts are ratified by appellants or they elect to take the benefits under the contracts.

In the Motion to Strike of the defendants Leona Holcomb and others (R. 5056, p. 60):

> (6) "• • • Plaintiff's liability in tort is joint with parties it omits in attempted interpleader. Its obliga-

tion to make contractual monthly payments is plaintiff's alone, and in no wise related or connected to the tort complained of."

The defendant Ellen Cash, who was a contingent annuitant of the large annuity but not a legatee under the will stated in a Motion to Vacate Injunction filed on behalf of Ellen Cash (R. 5056, p. 63):

"* * * And upon the further ground that this defendant is entitled to bring her suit upon said contract AN-33409 prepared and made for her by plaintiff, Aetna Life Insurance Company, if each suit becomes necessary, in the State of Idaho where she is a resident and citizen under existing law or elsewhere that she chooses conformable to law, * * *"

Ellen Cash in her Answer, (R. 5056, p. 64), says:

"She is entitled unequivocally to the monthly payments provided in the annuity contract after the death of Rosa B. Wright Rettenmeyer and Joseph A. Rettenmeyer, and defendant states that said plaintiff should be making said payments to this defendant at this time monthly as therein provided."

In paragraph 9 of the same answer Ellen Cash says:

"With respect to Paragraph 3 of plaintiff's complaint, defendant, Ellen Cash admits plaintiff prepared and executed the contract referred to in said paragraph, and did take and receive the sum of $162,606 therefor and state by reason thereof plaintiff is obligated to pay this defendant $123.07 monthly commencing with the 9th day of April, 1954, and continuing thereafter conformable to said contract AN-33409."

In her prayer in her answer the defendant prayed that if jurisdiction be retained she have judgment against the Plaintiff, Aetna Life Insurance Company, in the amount of $123.07. This is the judgment that was rendered in her favor.

Defendants Leona Holcomb, individually and as guardian of Donald George Fleming, and the other defendants in the same situation as Leona in their Answer (R. 5620, p. 6), contend in Paragraph VII of the Answer that Aetna has no defense to the payment and discharge of its obligations conformable to the annuity contract and then in Paragraph VIII say:

> "These defendants further expressly deny that there is any dispute or controversy respecting the denominated beneficiaries of said contract or their rights inter sese to the proceeds thereof; or the obligation of Aetna to pay the amount therein specified to the persons therein designated and in the amounts therein set forth."

Similar recognition of the validity of the annuity contracts appear throughout the pleadings and we will refer to each.

Answer of the defendants Leona Hocomb, individually, *et al.*, to Amended Complaint of Intervenors First National Bank, *et al.*, (R. 5620, p. 37), Par. 4 on p. 38 there.

In the separate answer of Mary Ellen Cash to Amended Complaint of plaintiff and intervenors (R. 5620, p. 40), in Paragraphs 3 and 4 she asserts the validity of the Aetna Life Insurance Company Policy No. AN 33409 and states that it is incontestable and states that it is a binding and valid obligation.

Again, in the Amendment to Answers filed by Leona Holcomb and others, (R. 5620, p. 45, *et seq.*) Par. C states the policy is incontestable and by reason of the incontestable provision of the policy plaintiff is barred and estopped from evading the obligation of the contract.

We find in the briefs filed on behalf of these same defendants similar statements. See supplemental brief of defendants Leona Holcomb and others (R. 5056, p. 81):

> "• • • Recovery by captioned defendants for damages for converting bonds does not prohibit or prevent the other defendants from recovery on the contract."

Again, in a brief filed by defendants "Denham Heirs" in response to right of F. E. Pence to intervene, referring to the Ellen Cash Answer it is argued:

> "The only answers on file seek payment conformable to the terms of the annuity contract attached to Aetna's Complaint."

In a later proceeding on September 17, 1954, on a decision by the court on a Motion to Dismiss and other motions in an argument we find the statement by Mr. Glenn O. Young regarding the liability of Aetna on the policy. See R. 5620, p. 85:

> "The Court: Let me ask you a question: What is Aetna's responsibility with reference to payment to these beneficiaries under the annuity contract?
>
> "Mr. Glenn O. Young: Well, that is—it is responsible—its responsibility is to pay in accordance with its contract, but here is where we ought to start: What is the responsibility for conversion?"

On April 13, 1956, in a proceeding for a restraining order on the application of Francis X. Rettenmeyer, statements were made by Mr. Glenn O. Young which admit the validity of the contract (R. 5620, p. 99):

> "Mr. Young: Well I want to point out that we have some rights here that look to us like ought to be protected under this non-contestable policy of the Aetna. • • •"

"The Court: I intend to try to protect Aetna against double liability to your client or anybody else."

"Mr. Young: Well, I don't understand there is any particular obligation upon this court to protect Aetna against either single or double liability. Aetna owes our clients under the admitted facts in this court and they are not paying under a non-contestable policy; they come into this court and obtained a restraining order to prevent paying a liability which they admit—

"The Court: You frequently have a distorted conception of what represents justice between the parties, my judgment—

"Mr. Young: "Well, it is natural since I represent people suing Aetna that I would not feel inclined to go along with the court that the court ought to specially protect Aetna. Here our clients have been restrained here from receiving money that admittedly Aetna owes; they don't deny they owe it—I mean, not restrained from receiving it, but Aetna has refused to pay, although there is no question about their liability. Here is the situation—• • •"

Again in an argument on motions to vacate the injunction, August 21st, 1956, Mr. Young (R. 5620, p. 106), referred again to the incontestable clause of the policy as follows:

"• • • Aetna has been in this court for, I think possibly now more than two years; they have neither paid this policy—there is no contest whatsoever among the beneficiaries under the policy; none of them are contesting in any particular—they have all agreed that the policy was issued—."

Finally, on the pre-trial hearing we find the final ratification of policy by the Denham heirs, including Donald George Fleming, (R. 5620, p. 133).

We submit that in foregoing statements of their counsel in their pleadings, arguments, and in their briefs, we find a ratification by the appellants of the Rosa B. Wright Rettenmeyer Annuity Contract.

We feel that the actions of counsel and the actions of the clients through their pleadings, ratify the annuity contract. Having indicated in their pleadings, in their briefs, and in their statements at the pre-trial hearing, an intention to be bound by the contract by accepting the benefits, the Denham heirs cannot recover the benefits under the policy and then recover in the conversion suit in 87402, the only one left, the funds that went to create the policy. Obviously the Denham heirs can gain no better position than that of Rosa B. Wright Rettenmeyer, had she lived. Assuming for purposes of argument that Rosa B. Wright Rettenmeyer had been overreached and defrauded by Aetna and Pence and the bonds had actually been tortiously and wrongfully converted, if she accepted the benefits of the contract, however badly she was abused and overreached, she is bound by all of its obligations, one of which was to pay the premiums.

We find two Oklahoma statutes on this point: Okla. Stat. Ann. Title 15, Section 75; Okla. Stat. Ann. 1951:

> "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known, to the person accepting."

Title 15, Sec. 74, Okla. Stat. 1951:

"A contract which is voidable solely for want of due consent may be ratified by a subsequent consent."

The cases which apply to this statute are as follows:

Oklahoma Title Company v. *Burroughs*, 172 Okl. 94; 44 P. 2d 852;

Appleman v. *Pepis*, 246 Pac. 225; 117 Okl. 199.

Scherbondy v. *Tulsa Boiler & Machinery Co.*, 226 Pac. 564, 99 Okl. 214;

Ft. Deerborn Trust & Savings Bank v. *Skelly Oil Company*, 146 Okl. 179; 293 Pac. 557.

Such ratification or acceptance is binding upon heirs of a beneficiary. See *Canning, et al.*, v. *Bennett, et al.* (1952) 206 Okl. 675; 245 P. 2d 1149 Syl. 8:

"Beneficiary, who had recognized trust by conveying portion of her beneficial interest thereunder and who had accepted large distributions made by trustee from trust estate and acquiesced in trust for several years without in any manner objecting thereto, would not thereafter be heard to question its validity; and she, having died, her heirs would likewise be estopped to complain."

Such a ratification by a party or heirs is applicable in the case of conversion. This ratification relates back to the date of original execution.

Farm Mortgage Inv. Co. v. *Caskell*, 168 Okl. 312; 32 P. 2d 736:

It applies in the case of one defrauded. *Holcomb and Hope Mfg. Co. of Indianapolis, Inc.* v. *Jones*, 102 Okl. 175; 228 Pac. 968.

A party cannot rescind a contract for fraud after affirming it.

Skinner v. *Scott*, 29 Okl. 364; 118 Pac. 394.

The doctrine of ratification has been held applicable in cases of conversion. See *Farmers Nat'l Grain Corp.* v. *Kurkendall*, (1938); 83 Okl. 17; 79 P. 2d 570:

Syl. 2. "If the owner expressly or impliedly assents to the appropriation, taking, use, or disposition of his property, he cannot recover in an action for conversion."

Mason, et al., v. *Nibel*, (1938) 120 Okl. 7; 263 Pac. 121.

Syl. 3 "Where a party sues for a conversion of his property he must allege and prove that it was mistaken and appropriated without his consent and if such party expressly or impliedly assents to the taking, use, or disposition of his property, he cannot recover for conversion thereof."

We submit at this point when the Denham heirs seek to assert that they are now entitled to collect their part of the policy and stand ready, able and willing to receive the benefits and make no contention as to the invalidity of the insurance contracts and when their counsel states that they do not question the payments that were made to Rosa B. Wright Rettenmeyer, which in itself would be a ratification by Rosa B. Wright Rettenmeyer, why then we believe they bring themselves within the rule of ratification and the court had no other choice.

A still earlier Oklahoma case is that of *Dodd-Lee Lumber Company* v. *Gur* (1915) 44 Okl. 630; 146 Pac. 16. Syl. 3:

"It is a well settled rule that if the owner expressly or impliedly admits to or ratifys, the taking use, or disposition of his property, he cannot recover

for a conversion thereof and it is equally well settled that this is true, notwithstanding defendant exceeded the power given him."

The general principle involved is found in Corpus Juris Secundum, Vol. 89 C. J. S., p. 535 Sec 5:

"If the owner of expressly or impliedly assents to or ratifies the taking, use or disposition of his property he cannot recover as for a conversion."

See *Mason* v. *Nibel*, 263 Pac. 121; 129 Okl. 7.

Dodd-Leer Hardwood Lumber Co. v. *Gur.*, 146 Pac. 16; 44 Okl. 630.

Wright v. *School Dist. No. 97, Canadian County*, 128 Pac. 241; 36 Okl. 294.

Aylesbury Mercantile Co v. *Fitch*, 99 Pac. 1089, 22 Okl. 475.

All through the case counsel have overlooked this fundamental principle of law. The rights of the Denham heirs can rise no higher than the rights of Rosa B. Wright Rettenmeyer. Had Rosa B. Wright Rettenmeyer been stark raving insane or hoplessly incompetent, and had made the annuity contract in question and then had been restored to sanity and had ratified the contract by accepting the benefits, then this foregoing rule of law would definitely apply. So when all through the pleadings in the case and in the pre-trial the appellants, Denham heirs, and their counsel, stated that they recognized the validity of both contracts, then there was no choice on the part of the court but to render the judgment at the pre-trial conference.

The interpleader act was passed by Congress in 1948 and the Court had power under the interpleader act, and under Rule 22 of the Federal Rules of court procedure

and the declaratory judgment act to declare the Donald George Fleming Contract a valid contract and enjoin the proceedings in the State Court where Donald George Fleming through his guardian sought a return to his benefactress' estate of the premiums.

Aetna's first action is based on the interpleader statute Title 28, U. S. Code Anno. Sec 1335 Interpleader.

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount or $500 or more, * * *

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any such obligation; * * *

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, C. 646, 62 Stat. 931."

Injunctions in such actions were provided for in Title 28, U.S.C.A. Sec. 2361.

Section 2361. Process and procedure.

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United

States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * *

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. June 25, 1948, c. 646, 62 Stat. 970, amended May 24, 1949, c. 139, 117, 63 Stat. 105."

This court held under Interpleader Acts prior to 1948 claimants in State Court actions could be enjoined.

Dugas v. *American Surety Co. of N. Y.*, 300 U. S. 414, 57 S. Ct. 515, 81 L. ed. 720.

Cases to the same effect since the 1948 Interpleader Act are *O'Daniel* v. *Porter* C. A. P. C. 1957, 218 F. 2d 636 and *Austin* v *Texas-Ohio Gas Co.* (C. A. Tex. 1955) 210 F. 2d 739.

Although there was no evidence introduced, we believe there is ample grounds in the pleadings and admissions and counsel's statements that $162,606 of the proceeds of the bonds allegedly converted went to pay the premiums on policy No. AN-33409. An allegation regarding the $162,606 premium appears in the Amendment to Complaint for Interpleader. An allegation is made. (R. 5056 p. 69).

Par. 1. "That the annuity contract mentioned in its original complaint, No. AN-33409 attached to the complaint as exhibit 1, was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of U. S. Government bonds mentioned in Paragraph 13 of the Amended Petition filed by *Leona Holcomb, et al.*, in case No. 29092 in the District Court and mentioned in Paragraph 14 in the original Petition filed by *Leona Holcomb, et al.*, in case No. 29092."

The original complaint for interpleader, in Case 33[illegible] on the large annuity (R. 5056 p. 4), alleges:

> Par. III. "Plaintiff alleges that on the 9th day of December, 1950, plaintiff entered into a contract with Rosa B. Wright Rettenmeyer of Sapulpa, Oklahoma, which contract is one for which Rosa B. Wright Rettenmeyer paid a premium of $162,606,"

and attaches a copy of the contract as plaintiff's Exhibit "1." Attached to the Exhibit is the application signed by Rosa B. Wright Rettenmeyer.

Further it was alleged in Paragraph I of the Amendment to Complaint for interpleader (R. 5056 p. 69):

> "That the annuity contract mentioned in its original complaint, No. AN-33409 attached to the complaint as 'Exhibit 1,' was purchased by Mrs. Rosa B. Wright Rettenmeyer with the proceeds of the United States Government bonds mentioned in Paragraph 13 of the amended petition filed by *Leona Holcomb, et al.*, in Case No. 29092 in the District Court of Creek County and mentioned in paragraph 14 in the original petition filed by the plaintiff *Leona Holcomb, et al.* in Case 29092."

A study of the answer of Leona Holcomb individually, and as guardian of Donald George Fleming, Frank T. Denham, Edward Denham, Clarence M. Denham, George H. Denham and Leona Denham Holcomb and Mary Jane Hopkins fails to deny the allegation as to the execution of this contract or the payment of the premium by Rosa B. Wright Rettenmeyer.

Under the rules of pleading under the Federal Rules of Procedure we find these facts therefore stand admitted. Rule 8:

"Rule 8 (d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading."

Further, in the answer of Ellen Cash, signed by Messrs. Young, Young & Young, the defendant, Ellen Cash, admits in Paragraph 9 of her Answer (R. 5056 p. 65):

"With respect to paragraph '3' of plaintiff's complaint, defendant, Ellen Cash admits plaintiff prepared and executed the contract referred to in said paragraph and did take and receive the sum of $162,606.00 therefor and states that by reason thereof plaintiff is obligated to pay this defendant $123.07 monthly commencing with the 9th day of April 1954 and continuing thereafter conformable to said contract AN-33409."

The finding that the $187,749.03 of the proceeds of the bonds were used to pay the premiums on both contracts is supported in a proceeding occurring on the 28th of November, 1956, prior to the pre-trial (R. 5620 p. 110) in which a motion for an order to compel answers to questions propounded on oral examination and to compel production and discovery of documents was being argued before the trial court. This record reveals by a statement of counsel for Aetna, that at the time of the motion there was pending a matter in the Estate of Rosa F. Wright Rettenmeyer in the County Court of Creek County and a large number of records were in possession of the First National Bank as executor These records were placed in the Court Clerk's office in Sapulpa and a portion of these records were introduced in evidence in the trial in the hearing on the final account in the Rosa B. Wright Rettenmeyer estate. Counsel then made this statement:

"Mr. Woolsey: In preparation of our case of terpleader, the interpleader action here, I deemed it important to look at some of those records, and take depositions of pertinent parts of those records, so I served a notice to take depositions on opposing counsel, and all parties interested, to take depositions on the 23rd of November, at which time I subpoenaed one Ed L. Murphy, and with Lee Snider, the Court Clerk of Creek County, to bring, and have with them, available, certain records. We started to take deposition and there were two books which had already been introduced in evidence and marked as exhibits in the District Court hearing, or the County Court hearing, which are cash books, and books of account of Rosa B. Wright Rettenmeyer, which I think were kept in the handwriting of her husband, or other members of her family, and these books bear entries pertaining to the cash transaction including the receipt to, Rosa B. Wright Rettenmeyer, and the disbursement of those annuities to certain parties for expenses in her last illness and various expenses of her household. And I deemed it important to have depositions taken, and be permitted—to have those books identified, and offered in evidence.

. . . . . .

"The Court: Just tell me what they are.

"Mr. Woolsey: They are cash books pertaining to the estate of Rosa B. Wright Rettenmeyer.

. . . . . .

"Mr. Woolsey: Mr. Murphy mentioned books kept in a double-entry system, a general ledger, a cash book, a voucher ledger, and notes receivable, and a material ledger, which he kept up to July 31, 1951. Well, these cover a period of time during which these annuities were purchased, and following that, so I deem it important to examine Mr. Murphy about the entries in those books and have those books made available.

The "Court: What do you expect to find in those books that might be material to any issue in this case?

"Mr. Woolsey: I expect to find more entries similar to what I have found in Aetna's Exhibits A and B; for example, they show receipt—

"The Court: Which tends to establish that the—

"Mr. Woolsey: Which—

"The Court:—that the amount used from the proceeds of the bonds to pay the—

"Mr. Woolsey: Pay the annuity contracts—

"The Court: For these annuity contracts.

"Mr. Woolsey: Yes, sir.

"The Court: And also tending to establish receipt by Mrs. Rettenmeyer during her lifetime—

"Mr. Woolsey: Either her, or her attorney-in-fact, or her estate, and her guardianship, and also tending to establish certain disbursements to individuals such as Leona Holcomb,—the defendants in these cases; in other words, these funds came in under this annuity, and then go out to pay nursing expense, some of which expenses were paid to Mrs. Denham, and various members of the family represented by the Youngs. They tend not only to show that but they tend to show the purchase of the annuities.

"The Court: Well, I don't anticipate that there could conceivably be any issue about the purchase of the annuities and the use of the funds.

* * * * * * * *

"Mr. Young, Sr.: I think we can stipulate to all counsel says; he is attempting to prove by these records. I don't think there is an issue about that. * * * There is no argument about receipt of that money. They have all the checks endorsed—I mean, the payments on the insurance—on the annuity; there is no argument about those matters—we are not contesting those matters—never have."

At various times as appears from the oral statement of counsel on argument on various matters, reference is made to the use of the ultimate proceeds of the bonds to purchase the annuities. Before the court was an argument on motion to dismiss. (R. 5620, p. 82):

> Mr. Glenn A. Young: Yes, sir, well, let it suffice to say that we have filed suit in the District Court of Creek County, Oklahoma. Originally the suit was filed for conversion by fraud for damages for the taking of the money that ultimately wound up in what they refer to generally heretofore in this litigation as the big policy. That is, this policy with the $162,000 single premium."

Again, on an argument on November 12, 1934, on motions of Pence, the bank and others to intervene, statement was made by Mr. Glenn O. Young (R. 5620, p. 90):

> "They take those bonds that are non-negotiable and then have Mr. Pence execute a form wholly whereby he purports to authorize exchange of those bonds for negotiable bonds, some that can be exchanged, and having exchanged the non-negotiable bonds—she had had them in that form to prevent exactly what happened, obviously—they then surrendered those negotiable bonds for cash, and deposited that to her credit in the bank."

In view of the foregoing the admissions in the pleadings, arguments, and stipulations show beyond question that the funds of Rosa B. Wright Rettenmeyer went to purchase the two insurance contracts.

(b)

The petitioner cites no cases where the pre-trial proceedings denied due process of law. It is not a deprivation of due process to decide a case where there are no issues to be tried. Neither is it lack of due process for a Court to enforce its decree by injunction otherwise the decree would be a nullity.

(c)

The court did not violate 28 U. S. C. A. 2238 prohibiting injunction to stay proceedings in a State Court. As that section specifically says "except where authorized by Act of Congress" we find permanent injunctions authorized in interpleader actions, Sec. 2361—

> "Such District Court shall hear and determine the case, and may discharge the plaintiff from further liability, *make the injunction permanent,* and make all appropriate orders to enforce its judgment."

Propositions II and III of Petitioner.

Where a minor devisee under a will has instituted a state court action for damages for the conversion of U. S. Bonds which constituted part of his testatrix's estate, in an action thereafter instituted in the federal court under 28 U. S. C. A. 1335, has the federal court jurisdiction to enjoin prosecution of the state court suit by a person who was not a party to the insurance policy upon which the denominated interpleader action was based and to enjoin prosecution of such suit against persons who are not parties to or claimants under such insurance policy or contract?

In an action instituted in the federal court under 28 U. S. C. A. 1335, where it affirmatively appears that there was no contest respecting liability of the insurer under its policy contract which was incontestable by its terms, has the federal court jurisdiction to summarily enjoin, without trial, evidence, findings of fact or conclusions of law, prosecution of a pending state court action for damages for conversion of U. S. Bonds which are alleged to have constituted assets of an estate in which plaintiff in the State Court suit was interested as devisee under a will?

The answer to these propositions has partially been answered heretofore.

Appellants assert that since Donald George Fleming was not a party to contract No. AN-33409 and never asserted or claimed any rights under the contract. That the court has no jurisdiction. We believe that the Court of Appeals, in its opinion in the case of *Holcomb* v. *Aetna*, 228 F. 2d 75 disposed of this contention.

Donald George Fleming is the beneficiary under the small annuity contract that is the subject of litigation in Case No. 5621. Donald George Fleming asserts in Case 87402 in the District Court of Tulsa County that he has been damaged by fraudulent acts of the defendants Aetna, Pence and the bank and bankers, and that the converted funds should be restored to the Executor of his great aunt, Rosa B. Wright Rettenmeyer.

We believe, as will be pointed out in another section of this brief that the undisputed facts from the pleadings and admissions of counsel, show that the bonds of Rosa B. Wright Rettenmeyer were changed into other bonds and

then ultimately into cash, which was deposited in the bank account of Rosa B. Wright Rettenmeyer. On her signed application the annuity contract No. AN-33409; was issued on payment of $162,606 on a check signed by Joseph Rettenmeyer, attorney in fact for Rosa. The money went to set up the policy and $39,000 of this was refunded under the annuity contract. To say Donald George claims no interest under Contract No. AN-33409, when he is seeking in a separate suit to recover the premiums, or recover funds that went to pay the premiums, is a most fallacious argument.

The court had jurisdiction of the smaller action on the Donald George Fleming policy.

Under Rule 22 of the Federal Rules of Civil Procedure, 28 U. S. C. A., Rule 22, Moore's Federal Practice, R. 22:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C., Secs. 1335, 1397 and 2361. Actions under those provisions shall be conducted in accordance with these rules." As amended December 29, 1948, effective October 20, 1949.

A cause of action in interpleader under Rule 22 was stated as the court had jurisdiction even though no diversity of citizenship between the adverse Denham heirs and Fleming. Our present action is one of non-statutory interpleader.

See Barron and Holtzoff, Federal Practice and Procedure, Sec. 552, Jurisdiction:

"The principle difference between Statutory interpleader and non-Statutory interpleader is available if the amount involved exceeds $500 and two or more of the claimants are citizens of different states. The citizenship of the plaintiff is immaterial and unimportant, at least if the plaintiff is a disinterested stakeholder. He may be of the same citizenship as one or more of the claimants, if at least one claimant is a citizen of a different state.

"Non-statutory interpleader, like any other claim for equitable relief, rests upon the same general principles of federal jurisdiction that governs actions of other types. Consequently the same complete diversity of citizenship between the plaintiff and all of the defendants must exist and the amount in controversy exclusive of interest and costs must exceed $3,000."

In support of our contention we refer to the case of *John Hancock Mutual Life Insurance Company* v. *Kraft* (U. S. Court of Appeals, 2nd Circuit 1953), 200 F. 2d 952:

"Interpleader action by insurance company against executors of insured, whose estate had been

made beneficiary of four life policies, and against insured's widow who claimed that she had given insured $42,000.00 in return for promise to make her beneficiary. The insurance company paid proceeds of the policies into court. The United States District Court for the Eastern District of New York Abruzzo, J., granted a temporary restraining order protecting the insurance company against suits in any other court. The executors appealed from order which continued the injunction, directed the executors and widow to interplead among themselves, discharged insurer from liability and denied executors' cross-motion for summary judgment. The Court of Appeals, Swan, Chief Judge, held that the insurance company, as stakeholder, was exposed to double liability and would not be required at its peril to determine whether widow or estate had the better claim, and when diversity existed between the insurance company on the one hand and the wife and the executors on the other hand, the Federal District Court had jurisdiction."

See also *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694. The record disclosed a cause of action and jurisdiction for interpleader of a non-statutory nature.

It also had jurisdiction of the suit as a *cause of action for a declaratory judgment.*

The authorities will support the theory that there was a cause of action and jurisdiction for declaratory judgment under the Declaratory Judgment Act.

The right of bringing an action for Declaratory Judgment is found in Title 28, U. S. C. A. Sec 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, and the District Court of the Territory of Alaska upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890.

Plaintiff's right to have a Declaratory Judgment is clear as appears from reference to Barron and Holtzoff, Federal Practice and Procedure, Sec 1262:

"The purpose of the Declaratory Judgment Act was to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage had accrued."

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Section 1263. Actual, Justiciable Controversy.

"In order to warrant a judgment for declaratory relief, there must be presented a real and substantial controversy between adverse parties and a claim for specific relief.

"The controversy must be 'actual' and justiciable as distinguished from hypothetical, abstract or moot. The word 'actual' as used in the statute is one of emphasis rather than definition. The party claiming declaratory relief must be confronted by a present and real dilemma or danger."

Section 1264. Particular Controversies.

"Much of the doubt and difficulty heretofore connected with actions for declaratory relief will disappear if the action be regarded as an ordinary civil

action, as Rule 57 intends. The incidents of pleadings, process, discovery, trial and judgment are the same. Only where the nature of the factual situation requires, is the prayer or demand for declaratory relief appropriate. The procedure 'is but a normal part of the ordinary civil action.' 'A plaintiff may ask for a declaration either as his sole relief or in addition or auxiliary to other relief, and a defendant may similarly counter-claim therefor. Thus the court is not, as formerly, limited to only remedial relief for defaults already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims, and the right to jury trial is fully preserved as in civil actions generally."

"Consequenty this form of relief is available in the most important and difficult types of cases. For example it is widely used in insurance and patent litigation. In insurance cases declaratory relief may be granted to determine the validity of a policy, the coverage of a liability policy, whether the insurer has waived conditions or provisions of a policy, the liability of the insurer, the extent of liability, the nature and extent of disability and whether the policy has lapsed for non-payment of premiums, ownership, assignment or change of beneficiary, the surrender or exchange of a policy, and other similar questions with respect to insurance."

An action for Declaratory Judgment may be joined with one for Interpleader.

West's Federal Forms, Sec. 4786 sets up a form sanctioned by the Supreme Court of the United States, Official Form 18 in which complaints for Interpleader and Declaratory Relief are permitted. The complaint herein follows this form.

The other authorities we have support jurisdiction in declaratory judgment actions where there is diversity of citizenship between the plaintiff and an actual controversy between the plaintiff and the defendants. In support of jurisdiction, a recent Tenth Circuit case is, as follows *Commercial Standard Insurance Company* v. *Honnour, et al.*, 1956 241 F. 2d 14:

> "Where Texas insurer brought action against additional insured and injured party, both residents of Oklahoma, for declaratory judgment as to whether such insured had breached cooperation clause of automobile liability policy, the insured did not stand in such position of party plaintiff as would defeat federal District Court's diversity's jurisdiction, 28 U. S. C. A., Sec. 2201."

Connecticut Indemnity Company v. *Lee*, 168 F. 2d 420.

> "Where jurisdiction of action under Federal Declaratory Judgment Act, 28 U. S. C. A. former 400 (now 2201 and 2202), to determine whether personal injury action against its insured was covered by Massachusetts compulsory motor vehicle liability policy issued by plaintiff was founded on diversity of citizenship between plaintiff and all defendants, counterclaim by defendant insurance company, which has issued a public liability policy to insured, for a determination that its policy did not cover accident forming basis of personal injury action arose out of same transaction and was ancillary to main action, is that no independent jurisdictional grounds were required to sustain it."

This action on the Donald George Fleming Policy was brought under Rule 22, and under Rule 22 diversity of citizenship is not required between adverse claimants. The only diversity of citizenship that is necessary is diversity

of citizenship between Aetna Life Insurance Company of Connecticut and the defendants all citizens of Oklahoma. Certainly the Court had jurisdiction of the case as a declaratory judgment action which was the Final Judgment that was entered. See (R. 5621, p. 206) Journal Entry of Declaratory Judgment.

Proposition IV of Petitioner.

In actions instituted in the federal court, purporting to be in the nature of interpleader under 28 U. S. C. A. 1335 where the record affirmatively discloses that by their terms the insurance contracts in question are incontestable, that there is or has been no controversy among the beneficiaries under the insurance contracts, or any of them, concerning any of the terms or conditions of the policies, or the liability of the insurer, may the federal court, at pre-trial conference, without evidence to show existence of a suit in the nature of interpleader and of which the federal court has jurisdiction, and without findings of fact or conclusions of law, summarily enjoin prosecution by a minor devisee under a will of a pending state court suit for damages for conversion which constituted part of his testatrix's estate, on the theory that the judgment on such feigned and fictitious issues in interpleader suit is res adjudicata of issues pending undetermined in a state court of competent jurisdiction, where in the state court suit there has been no removal and the suit is not removable because of lack of diversity of citizenship of the parties thereto?

This proposition is mainly a rehash of the Propositions II and III.

Petitioner reasserts that his $33,000 annuity contract is now incontestable by reason of its incontestable clause he still asserts his right to participate in a suit to reclaim the funds that paid the premiums. The record shows there was a real controversy between the plaintiffs in the state court suits seeking recovery of the premiums, these plaintiffs were made defendants in the interpleader action along with other claimants who were claiming the benefits of the insurance contract as annuitants. There was a real controversy and not a fictitious or feigned issue.

The pre-trial judgment did not destroy Donald George Fleming's insurance contract. It held that his contract was a valid contract in full force and effect and orders the Aetna Life Insurance Company to pay the policy when due. (R. 5621, p. 209)

Plaintiff's whole complaint is that when he ratified this contract at the pre-trial and in his pleadings the trial court held he could not proceed with a suit to recover the premiums.

The Present Case Is Not Such a Case as Under the Rules in Its Present Status Justifies *Certiorari*

Rule 19 of this Court is as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character or reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial questions in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A study of the petition fails to show that the present case is brought within the scope of the above rule.

Counsel cites *Louther* v. *New York Life Ins. Co.*, (3 Cir.), 278 Fed. 405, as authority for the proposition that there is a divergence of opinion between the circuits. An examination of this case reveals it was decided in 1918, and Congress has seen fit to give the courts power of injunction both temporary and permanent in the Interpleader Act of 1948.

Permanent injunction in an interpleader action has been upheld in *Haynes* v. *Felder*, U. S. Court of Appeals 5th Circuit 1957, 239 F. 2d 868.

The decision in the case at bar is not in conflict with the *Louther* case.

Conclusion.

The case presented by petitioner does not reveal a situation of special circumstances that justify the granting of the writ in view of the rules of this Court and the long-standing rulings that certiorari is granted only in special circumstances and only in cases of peculiar gravity and general importance. For these and the foregoing reasons it is respectfully urged that the judgment of the United States Court of Appeals for the Tenth Circuit is eminently correct and the application for a writ of certiorari should be denied.

Respectfully submitted,

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